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Labor Law - Labor-Management Relations Act - Applicable Remedies When an Employer Transers to a New Location to Avoid Dealing With a Union

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LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT—APPLICABLE REMEDIES WHEN AN EMPLOYER TRANSFERS TO A NEW LOCATION TO AVOID DEALING WITH A UNION—An interstate trucking concern with depots in numerous cities, was approached by a union seeking recognition as the bargaining representative of the office and clerical workers at one of the depots. The employer, after interrogating the employees involved as to their union affiliation, transferred the clerical work done at that depot to an office in a different city, but continued operating the trucking depot itself. The clerical employees were discharged but were offered reinstatement at the new location, together with reimbursement of the expenses of moving to the new location. *Held*, the employer violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act.[1] The Board awarded the discharged employees back pay from the date of discharge to the date of the offer of reinstatement at the new location, ordered the employer to offer the discharged employees reinstatement if and when it resumed operations at the new location but, with Member Murdock dissenting, refused to order the resumption of the clerical operations at the old location. *Tennessee-Carolina Transportation Co.*, 108 N.L.R.B. No. 179 (1954).

[1] Labor-Management Relations Act, 1947, 61 Stat. L. 140 (1947), 29 U.S.C. (1952) §§158(a), (b) and (c).

The traditional affirmative remedy applied by the Board in case of a run-away shop has been back pay from the date of discharge to the date of an offer of reinstatement, together with an order of reinstatement at either the old or new location, and if the latter is chosen, reimbursement of expenses of moving the employees and their families to the new location.[2] Where the original movement to the new location was an unfair labor practice, such an order has invariably been enforced by the circuit courts.[3] In no case, however, has the Board ordered a run-away shop to be returned to its old location.[4] This is true regardless of whether all or only part of the operations were moved,[5] or whether the moving by the employer was or was not, in itself, an unfair labor practice. The Board has, on occasion, indicated that its reluctance to issue such an order is based on the failure of the union to request such an order,[6] the possibility of prejudicing other employees who have already moved to the new location,[7] and the existence of a substantially equivalent remedy in the order for reimbursement of expenses of moving the employees and their families to the new location.[8] There is little doubt but that the Board has power to issue such an order under the broad language of section 10(c) of the act.[9] The Board has affirmatively stated that it has such power,[10] and the courts have repeatedly affirmed the Board's right to make any non-capricious affirmative order which effectuates the policies of the act.[11] One objection to an order for the return of the run-away

[2] Schieber Millinery Co., 26 N.L.R.B. 937 (1940); S and K Knee Pants Co., 2 N.L.R.B. 940 (1937); 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 992 (1940). Although this is the ordinary remedy, the Board in its discretion has ordered only back pay and reinstatement without moving expenses. Robinson v. Golluber, 2 N.L.R.B. 460 (1936). On one occasion the alternative order included a provision for the payment of the employee's expenses of commuting biweekly to the new location. Jacob H. Klotz, 13 N.L.R.B. 746 (1939). But the Board refused this latter type remedy, although recommended by the Trial Examiner, in New Madrid Mfg. Co., 104 N.L.R.B. 117 (1953).

[3] NLRB v. Gerity Whitaker Co., (6th Cir. 1942) 137 F. (2d) 198; Schieber Millinery Co. v. NLRB, (8th Cir. 1940) 116 F. (2d) 281. Compare NLRB v. Remington Rand, Inc., (2d Cir. 1938) 94 F. (2d) 862, in which the order to pay moving expenses of employees was denied enforcement. In the latter case, the run-away shop had not itself violated the act.

[4] That this is largely an interstate problem is indicated by the fact that the state labor boards in New York and Pennsylvania have never passed on the question.

[5] Robinson v. Golluber, note 2 supra; Omaha Hat Corp., 4 N.L.R.B. 878 (1938).

[6] Jacob H. Klotz, note 2 supra.

[7] Ibid.

[8] Shieber Millinery Co., note 2 supra. That the alternative remedy applied in most cases by the Board is not substantially equivalent, see the dissenting opinions by Member Smith in Schieber Millinery Co., note 2 supra, and in Williams Motor Co., 31 N.L.R.B. 715 (1941), which agree with Member Murdock in the principal case.

[9] The Board may take "such affirmative action . . . as will effectuate the policies of this Act." 61 Stat. L. 147 (1947), 29 U.S.C. (1952) §160(c). The pre-enactment materials indicate that the framers intended to invest the Board with the powers of a court of equity (except for powers of enforcement) insofar as such powers would effectuate the policies of the act. S. Rep. No. 573, 74th Cong., 1st sess., pp. 2, 3 (1935). Also see 1939 WIS. L. REV. 445.

[10] Rome Products Co., 77 N.L.R.B. 1217 (1948).

[11] NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261, 58 S.Ct. 571 (1938); Williams Motor Co. v. NLRB, (8th Cir. 1942) 128 F. (2d) 960.

shop might be that such an order is punitive and not remedial.[12] This objection, however, is irreconcilable with the maxim that the policies of the act are best effectuated by a return of the parties to the status quo ante the unfair labor practice,[13] and the statement of the Board that the status quo ante may be best achieved by ordering the employer to return to the old location.[14] On the other hand, the Board's consistent use of an admittedly second-best remedy may be explained on the theory that ordering the employer to return to the old location would work such a dislocation in the business of the employer as to disrupt interstate commerce itself and consequently not effectuate the policies of the act.[15] Such an order, although used to enforce a strictly public rather than a private right,[16] has in it some of the characteristics of an equity order under the "balance of convenience doctrine,"[17] and this might well explain the orders made in the run-away shop cases prior to the present one.[18] But such a theory would not explain the failure to issue the order to return to the old location in the principal case, where the dislocation caused by such an order would obviously not disrupt interstate commerce. In the principal case the Board found that the employer was motivated by both anti-union and economic considerations when it moved its operations to the new location, and the existence of these economic considerations was the mitigating factor which caused the Board to refuse to issue the order to return to the old location. This approach is subject to the difficulty that, while an employer motivated only by economic considerations may move his business anywhere he chooses without interference from the act,[19] an employer motivated wholly by anti-union considerations in moving his operations will undoubtedly consider the purely economic advantages of the various

[12] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 61 S.Ct. 845 (1941). That the same problem (remedial or punitive) exists under some state labor relations acts, see Folding Furniture Works v. WLRB, 232 Wis. 170, 285 N.W. 851 (1939). This was the rationale used by Judge L. Hand in refusing to enforce a Board order to pay moving expenses to the new location in NLRB v. Remington Rand, Inc., note 3 supra, but the case may be distinguished on other grounds. That the origin of the analysis is obscure, is not found in the act, and probably lies in dictum, see 89 UNIV. PA. L. REV. 648 at 655 (1941).

[13] NLRB v. Lightner Pub. Corp., (7th Cir. 1942) 128 F. (2d) 237.

[14] Jacob H. Klotz, note 2 supra.

[15] The amount of the dislocation of the employer's business has traditionally been one of the considerations of the Board. Moorseville Cotton Mills v. NLRB, (4th Cir. 1938) 97 F. (2d) 959.

[16] National Licorice Co. v. NLRB, 309 U.S. 350, 60 S.Ct. 569 (1940).

[17] Cases on the balance of convenience rule may be found in 39 A.L.R. 896 (1925) and 31 L.R.A. (n.s.) 881 (1911). As applied by the Board, however, it would not be the hardship to one of the parties which would control the application of the doctrine, but the degree of actual dislocation of interstate commerce—a public hardship. It should be noted that the doctrine was used in equity for temporary rather than final relief.

[18] The fact situations in all of the run-away shop cases prior to the present one indicate that the employer had invested large sums in the movement. Even here, however, equity courts have shown both a power and a willingness to force an employer to resume operations at the old location. Dubinsky v. Blue Dale Dress Co., 162 Misc. 177, 292 N.Y.S. 898 (1936). See also 36 COL. L. REV. 776 (1936).

[19] NLRB v. Jones and Laughlin Steel Co., 301 U.S. 1, 57 S.Ct. 615 (1937); NLRB v. Cape County Milling Co., (8th Cir. 1944) 140 F. (2d) 543.

places he may go, thus automatically laying the foundation for a claim of dual motivation and mitigation of the stricter remedy. If nothing else, however, at least the principal case indicates the need for a thorough explanation by the Board of the rationale it uses in determining the remedy to be used in the runaway shop cases.

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